Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

In the Matter of
ELIAN GONZALEZ
A Person Under the Age of 18

ROBERT A. HIRSCHFELD, JD
Member, National Congress for Fathers and Children
Next Friend of Elian Gonzalez
Petitioner, Pro Se

v.

HON. ROSA RODRIGUEZ
Judge, Miami-Dade Superior Court, Miami, Florida
DAN BURTON
United States Representative,
and
LAZARO GONZALEZ
Respondents

On Petition for a Writ of Habeas Corpus Under the Original Jurisdiction of The United States Supreme Court

PETITION FOR WRIT OF HABEAS CORPUS

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January 17, 2000

QUESTION PRESENTED

Should the minor child Elian Gonzalez by way of a dispositive Supreme Court Habeas Corpus action, be permitted immediate return via the Immigration and Naturalization Service to his only surviving parent, his Father in Cuba?

LIST OF PARTIES

Real Party in Interest Elian Gonzalez is a six year old Cuban National

Petitioner Robert A. Hirschfeld, JD, appearing here ***pro-se*** as next friend of Elian Gonzalez (not in capacity of Elian's counsel), is a citizen of the United States, a founding member of the board of directors of the National Congress for Fathers and Children (NCFC), a father, a grandfather, a prominent advocate of preservation of the Father-Child bond, a member of the State Board and former cooperating attorney for the Arizona Affiliate of the American Civil Liberties Union (AzCLU), and a wrongfully disbarred former member of the Arizona State Bar[1].

Respondent Rosa Rodriguez is a Judge of the Miami-Dade Superior Court, Miami Florida

Respondent Dan Burton is a member of the United States House of Representatives from the State of Indiana

Lazaro Gonzalez is a great uncle of Elian Gonzalez, residing in Miami, Florida

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[1] *Hirschfeld v. Zlaket*, Petition for Certiorari No. 98-891 11/23/98,, Cert. Den ___ U.S. ___ -

TABLE OF CONTENTS

QUESTION PRESENTED	I
LIST OF PARTIES	ii
TABLE OF CONTENTS	
TABLE OF AUTHORITIES	
TABLE OF STATUTES AND ACTS OF CONGRESS	
TABLE OF OTHER AUTHORITIES	
OPINIONS BELOW	2
JURISDICTION	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
Extraordinary, rarely granted Supreme Court exercise of Original Habeas Corpus Jurisdiction is necessary.	5
Supreme Court Abstention is inappropriate and unnecessary in this matter	8
Petitioner properly asserts next friend standing to seek Habeas Corpus	11
Statutory and Treaty Grounds for return of Elian to his father in Cuba	13
CONCLUSION	18
Verification	18

TABLE OF AUTHORITIES

Citation	Page
Atlantic Coast Line R.R. v. Brotherhood of	9
Ashby v. White, 14 How. St. Tr. 695, 814 (Q. B. 1704).	11
Locomotive Eng'rs, 398 U.S. 281, 296, 90 S. Ct. 1739, 1747-48, 26 L. Ed. 2d 234 (1970))	
Bechtold v. City of Rosemount, 104 F.3d 1062, 1065 (8th Cir. 1997).	9
Blanton v. United States, 94 F.3d 227, 233-34 (6th Cir. 1996)	8
Buechold v. Ortiz, 401 F.2d 371, 373 (9th Cir. 1968)	10
Collins v. Traeger, 27 F.2d 842, 843 (CA9 1928);	11
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983).	8
Ex Parte Swall, 36 Nev. 171, 134 P. 96, 97 (1913)	6
Goetzman v. Agribank, FCB (In re Goetzman), 91 F.3d 1173, 1177 (8th Cir.), cert. denied, 519 U.S. 1042, 117 S. Ct. 612, 136 L. Ed. 2d 537 (1996).	9
Hatcher v. United States Trustee (In re Hatcher), 218 B.R. 441 (B.A.P. 8th Cir. 1998);	9
Hirschfeld v. Zlaket , Petition for Certiorari No. 98-891 11/23/98, , Cert. Den ___ US ___	ii

In re Burrus, 136 U.S. 586, 10 S.Ct. 850, 34 L.Ed. 500 (1890); 6

In re Johnson, 210 B.R. 1004, 1006 (Bankr. W.D. Tenn. 1997). 8

In the Matter of Barry ,136 U.S. 597, 602-603, 34 L.Ed. 503 (1844). 6

James v. Draper (In re James), 940 F.2d 46, 52 (3d Cir. 1991); 10

Johnson v. DeGrandy, 512 U.S. 997, 1005-06, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994) 9

Jones v. Cunningham, 371 U.S. 236, 238-240, 240 n. 12, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963). 6

Keene Corp. v. Cass, 908 F.2d 293, 296 (8th Cir. 1990) 9

Lake v. Capps (In re Lake), 202 B.R. 754, 758 (B.A.P. 9th Cir. 1996) 10

Magaziner v. Montemuro, 468 F.2d 782, 787 (1st Cir. 1972); 10

Morgan v. Potter, 157 U.S. 195, 198 (1895) 11

Morrow v. Torrance Bank (In re Morrow), 189 B.R. 793, 808-09 (Bankr. C.D. Cal. 1995) 9

Nash ex rel. Hashimoto v. MacArthur, 87 U.S. App. D.C. 268, 269-270, 184 F.2d 606, 607-608 (1950), cert. denied, 342 U.S. 838 (1951). 11

Nguyen Da Yen v. Kissinger, 528 F.2d 1194(9th Cir. 1975).6

Resolute Ins. Co. v. North Carolina, 397 F.2d 586, 589 (4th Cir. 1968)) 9

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2nd 147(1973). 7

Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923) 8

Smith ex rel. Missouri Public Defender Comm'n v. Armontrout, 812 F.2d 1050, 1053 (CA8), cert. denied, 483 U.S. 1033 (1987); 11

Snider v. City of Excelsior Springs, Mo., 154 F.3d 809, 812 (8th Cir. 1998) 9

Sun Valley Foods Co. v. Detroit Marine Terminals, Inc. (In re Sun Valley Foods Co.), 801 F.2d 186, 189 (6th Cir. 1985) 9

United States ex rel. Funaro v. Watchorn, 164 F. 152, 153 (SDNY 1908 11

United States ex rel. Toth v. Quarles, 350 U.S. 11, 13, n. 3 (1955) 11

United States v. Owen, 54 F.3d at 274. 9

Weber v. Garza, 570 F.2d 511, 513-514 (CA5 1978) 11

Morris v. United States, 399 F. Supp. 720, 722 (ED Va. 1975)... 11

Wilson v. Lane, 870 F.2d 1250, 1253 (CA7 1989), cert. pending, No. 89-81 11

Wood v. Orange County, 715 F.2d 1543, 1547 (11th Cir.1983), cert. denied, 467 U.S. 1210, 104 S. Ct. 2398, 81 L. Ed. 2d 355 (1984). 10

Young v. Murphy, 90 F.3d 1225, 1230 (7th Cir.1996). 10

TABLE OF STATUTES AND ACTS OF CONGRESS

18 USC 1001; PL103-173 **International Parental Kidnaping Crime Act of 1995** (IPKCA), 14

28 USC 534; PL97-292 **Missing Children's Act of 1982** 13

28 USC 1738A **Parental Kidnaping Prevention Act of 1980** (PKPA)PL96-611 13

28 U.S.C. §2241 3

28 U.S.C. §2242 12

42 USC 5771 et seq.;PL98-473, **Missing Children's Assistance Act of 1984** 13

42 USC 5779, 5780; PL101-647 **National Child Search Assistance Act**, 13

42 USC 11601 et.seq.; PL100-300 **International Child Abduction Remedies Act** (ICARA) 42 USC 11601 et.seq.; PL100-300 13

Companion Agreement on Migration. **15**

Convention on the Civil Aspects of International Child Abduction (The Hague, 10/25 14

F.S.A §. 61.13(b) 1. 16

F.S.A.§ 61.1304 17

F.S.A.§ 61.1308 17

F.S.A §.61.1348 16

F.S.A.§ 61.1308 17

F.S.A.§787.03 17

Uniform Child Custody Jurisdiction Act 14
F.S.A.§§61.1302 to 61-1348 (Florida UCCJA)

United Nations Convention on the Rights of the Child 16

U.S.-Cuba Joint Communiqué on Cuba-U.S. Migration, New York City, September 9, 1994 15

TABLE OF OTHER AUTHORITIES

Developments in the Law - Federal Habeas Corpus, 6
83 Harv.L.Rev. 1038, 1073 n.6 (1970);

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PETITION FOR WRIT OF HABEAS CORPUS

Petitioner respectfully prays that a Writ of Habeas Corpus issue for the release of Elian Gonzalez from restraint by named Respondents, their agents and successors, and by such other Respondents as may be added to this Petition by Amendment, which restraint hinders or prevents his return to the lawful care, custody and control of his father, Juan Gonzalez, in Cuba.

OPINIONS BELOW

On information and belief, at the time of filing this Petition for Writ of Habeas Corpus, there are no dispositive nor appealable opinions in any inferior court. The Supreme Court may take judicial notice that a number of dilatory judicial and congressional matters are pending, to wit:

1. Respondent Rosa Rodriguez, a Florida State judge, has purported to award custody or guardianship of the child Elian Gonzalez to his great uncle, Lazaro Gonzalez, on a temporary basis pending further domestic relations proceedings in her court. She was manifestly without jurisdiction to do so, as will be argued herebelow.

2. Respondent Dan Burton, a Representative in the United States Congress, has purported to issue a subpoena for appearance before Congress, to the child Elian Gonzalez, for the openly stated sole reason of delaying the transport by the Immigration and Naturalization Service of Elian to his father in Cuba. Said Subpoena is beyond the testimonial information-gathering purpose for which Congress is empowered to subpoena witnesses, and because of its publicly stated purpose, arguably exceeds the constitutionally granted powers of Congress.

3. There are declared intentions by Respondent Lazaro Gonzalez to use a jurisdictionally infirm State Court guardianship, as a springboard to formally seeking refugee status for Elian, who is arguably still in the legal custody of his father, Juan Gonzalez, contrary to the stated intent and desire of Juan Gonzalez.

4. On information and belief, there are numerous other dilatory schemes, some publicized in advance, and others probably still secret, amongst various political and governmental factions, such as the proposed Congressional Bill seeking to make the child Elian Gonzalez a U.S. Citizen, all aimed at thwarting the lawful, necessary, expeditious and proper return of Elian Gonzalez to his Father in Cuba.

JURISDICTION

Original Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §2241 *et.seq*

STATEMENT OF THE CASE

Elian Gonzalez' mother drowned while attempting to abscond with six year old Elian in November 1999 from Cuba to Florida. Elian himself nearly drowned, but was rescued after several days floating the Atlantic Ocean in an inner tube. He was temporarily placed with distant relatives in Miami.

During the past two months, Elian's relatives in Miami, encouraged by Miami's Cuban political refugee community, as well as politically cynical national legislators, have sought to delay and circumvent the clear duty of the United States to return Elian to his father in Cuba, under International Treaties, Conventions, and the laws of the United States.

Because of the circumstances of his offshore rescue, Elian is subject to the exclusive jurisdiction of the U.S. Immigration and Naturalization Service (I.N.S.), which, with the carefully evaluated approval of the Attorney General and the President, resolved to mitigate the separation of Elian and his father by proposing to return the boy on January 14,

2000. That reunion date has passed, unfulfilled, because of actual and threatened conduct of actors including, but not limited to, Respondents to this Habeas Corpus action.

Respondent Florida Judge Rosa Rodriguez has exceeded her jurisdiction by making a nominal temporary custody or guardianship award of the boy to his great-uncle, Respondent Lazaro Gonzalez, ostensibly to create a jurisdictionally infirm status by which a contrived Petition for Asylum could be filed.

Respondent Representative Dan Burton has wrongfully applied Congressional Subpoena power for the publicly claimed purpose of preventing the boy from leaving the United States.

In addition to announced plans to seek, for tactical purposes, a special, accelerated congressional endowment of citizenship upon a child lacking the maturity or legal capacity to seek or assent to such citizenship, there are undoubtedly numerous other schemes, which, hatched one after another, could achieve such an extended isolation of Elian from his father, that it eventually would be claimed that the father-son relationship had ceased to exist.

The tactic of unlawful isolation and alienation is not uncommon as applied to divorced or separated American fathers and their children. The National Congress for Fathers and Children, of which Petitioner was in 1981 a founder, has for nearly two decades contributed by education, to a growing public awareness of the essential role played by close, nurturing fatherhood. Reportedly, Elian's Cuban joint custody status involved his spending somewhat more than half time in the care of his father, Juan Gonzalez. Regardless of the motives behind the boat-borne absconding of Elian by his mother, he is left with only one surviving parent, whose fitness and recently close paternal relationship are not seriously questioned by anyone.

REASONS FOR GRANTING THE WRIT

Extraordinary, rarely granted, Supreme Court exercise of Original Habeas Corpus Jurisdiction is necessary

A simple, tragic, factual situation has quickly become a multifarious political football, embroiling administrative, legislative and judicial entities, both state and federal. The potential for interminable, intentionally delayed conflict between the various actors threatens, absent expedited intervention of the one entity capable of overriding them all, to drown the existing strong relationship between a young Cuban boy and his joint-custodial Cuban father.

The United States Supreme Court is the only entity inevitably able to decide the fate of the Cuban boy. Competing actors are capable of perpetual delay. Petitioner asserts the inherent futility of first seeking State or District Court Habeas Corpus. Because of the separation of powers and the inherent tensions of Federalism, none except the Supreme Court may dispositively seize and exercise the control necessary to bring the turmoil expeditiously to rest. Such extraordinary exercise is inherently in furtherance of the Supreme Court's appellate powers.

Federal Habeas Corpus power may be invoked when a non-citizen child is involuntarily brought into the United States, and raises questions of fundamental human rights, liberty and due process rights.[2] Federal Jurisdictional

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[2] "In essence, plaintiffs allege that the defendants' cooperation in the removal of a child from Vietnam without proper custody of it having been obtained (including by totally voluntary parental releases), and its continued, allegedly involuntary, detention in this country in custody other than that of its natural parent, is a violation of the child's

intervention is proper to challenge and test the propriety of custodial restraints upon a minor child in Elian's situation.[3]

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fundamental human rights and of its Fifth Amendment right to liberty and due process " ***Nguyen Da Yen v. Kissinger***, 528 F.2d 1194 (9th Cir. 1975).

[3] "... the district court did have jurisdiction to enter its order under its habeas corpus power, 28 U.S.C. § 2241. This suit is essentially a challenge to the legality of the children's present custody. The traditional function of the Great Writ has been to "afford a swift and imperative remedy in all cases of illegal restraint or confinement;"[fn14] we see no reason here why the complaint may not be treated as a joint or class application for a writ of habeas corpus (on behalf of those ultimately determined to be illegally detained), and the legality of the children's custody tested in habeas proceedings.

" The "in custody" jurisdictional prerequisite to § 2241 habeas jurisdiction is met. As the Court has recognized, custodial restraints on a minor child, even if voluntarily submitted to by the child, have long been held a sufficient deprivation of the child's liberty to be tested by way of habeas corpus. ***Jones v. Cunningham***, 371 U.S. 236, 238-240, 240 n. 12, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963). See ***Developments in the Law - Federal Habeas Corpus***, 83 Harv.L.Rev. 1038, 1073 n.6 (1970); ***Ex Parte Swall***, 36 Nev. 171, 134 P. 96, 97 (1913); ***In re Burrus***, 136 U.S. 586, 10 S.Ct. 850, 34 L.Ed. 500 (1890); ***In the Matter of Barry*** (reported as a note to ***In re Burrus***), 136 U.S. 597, 602-603, 34 L.Ed. 503 (1844). The child is presumptively detained if the custody is illegal, ***see Ex Parte Swall***, supra; ***In re Barry***, supra, at 603, 34 L.Ed. 503 -...

"Detention need not be by governmental authorities to confer §2241 jurisdiction. The Great Writ, habeas corpus ad subjiciendum, was even in Blackstone's time a remedy "in all manner of illegal confinement," including false imprisonments by private persons. 3 W. Blackstone, Commentaries 127-132. The Federal habeas statute predicates the exercise of Federal habeas jurisdiction not on the character of the custodian, but on that of the custody: "in violation of the Constitution or laws of the United States." While most private detentions (and child custody conflicts) do not rise to the level of constitutional violations,[fn15] the governmental involvement in facilitating and maintaining the allegedly illegal physical and legal custody exercised respectively by the foster parents and adoption agencies does present that possibility here, and habeas jurisdiction is proper.[fn16]"
Nguyen Da Yen v. Kissinger, 528 F.2d 1194 (9th Cir. 1975).

Beginning with the jurisdictionally defective January 2000 actions of Respondent Florida Judge Rosa Rodriguez each governmental and private act restraining Elian from lawful return to his father, is destined for attempted review in the United States Supreme Court. Such a process is ordinarily complex and fraught with delay. Examples of intentionally dilatory acts by Respondents herein, publicly invite further, independent maneuvering and forum-shopping by others. To permit Supreme Court examination in due course, years later, might abstractly, with hindsight, establish public precedents concerning matters "capable of repetition, yet evading review",[4] but cannot avoid irreparable damage to the relationship between Elian Gonzalez and his father.

Time is of the essence in accomplishing the lawful return of the boy to his father. Every day the father and child remain wrongfully separated, those whose political ends are served by the separation, increasingly can claim that the natural emotional bond is weakened. Every day in which the immature, impressionable boy is allowed to be pressured by his Miami-based relatives to utter expressions preferring their political views over his likely natural desire to restore his recently interrupted primary residence with his father, constitutes an insidious form of mental child abuse.

Exhaustion of lower-court state or federal remedies is inappropriate to, and impractical in, this situation. Such exhaustion, urged by opponents of reunion, including Respondents, inherently would cause, merely by passage of time, irreparable damage to the relationship of a father and his child wrongfully separated, not just by approximately ninety miles, but by a political chasm.

Only the United States Supreme Court has the power to cut short all of the dilatory political maneuvering by which

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[4] ***Roe v. Wade***, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2nd 147(1973).

Elian remains detained from reunion with his father. Only by its rare, but statutorily grounded, exercise of Original Habeas Corpus jurisdiction over the diverse federal and state actors from various branches of government, may the necessary speed of that reunion be achieved.

Supreme Court Abstention is inappropriate and unnecessary in this matter

Persons wishing to perpetuate the restraint of Elian's return to his father, would likely raise the issue of Abstention (the voluntary forbearance by a lower Federal Court from interference in asserted areas of State Court jurisdiction.) The United States Supreme Court should not be swayed by such arguments.

Based upon the State, Federal and International law cited herebelow, no State has jurisdiction over, nor a *parens patriae* interest in, the domestic relations custody of Elian Gonzalez.. The boy's unlawful absconding, his temporary absence from Cuba, and the facts surrounding his rescue on the high seas, do not form any State jurisdictional foundation.

Although Rooker-Feldman[5] abstention might interfere with a Federal District Court's remedy of the wrongful

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[5] The ***Rooker/Feldman*** doctrine is derived from two Supreme Court cases decided sixty years apart, ***Rooker v. Fidelity Trust Co.,*** 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923), and ***District of Columbia Court of Appeals v. Feldman***, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983). The doctrine expresses the principle that "federal trial courts have only original subject matter, and not appellate, jurisdiction [and] . . . may not entertain appellate review of [or collateral attack on] a state court judgment." ***In re Johnson***, 210 B.R. 1004, 1006 (Bankr. W.D. Tenn. 1997). ***Rooker/Feldman*** is a limitation on subject matter jurisdiction in federal courts. See ***Blanton v. United States***, 94 F.3d 227, 233-34 (6th Cir. 1996) ("Lower federal courts have no jurisdiction directly to review final decisions of the courts of a state or similar jurisdiction in judicial

Florida Court claim of jurisdiction, Supreme Court abstention would be inappropriate.[6]

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proceedings.") (citing ***Feldman,*** 460 U.S. at 476; ***Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs***, 398 U.S. 281, 296, 90 S. Ct. 1739, 1747-48, 26 L. Ed. 2d 234 (1970)). The doctrine complements the statutory jurisdictional scheme of the federal courts, including 28 U.S.C. § 1257, that limits federal review of state court proceedings to the United States Supreme Court. ..."

"The 'Rooker-Feldman' Doctrine bars a lower federal court from conducting a virtual 'review' of a state court judgment for errors in construing federal law or constitutional claims 'inextricably linked' with the state court judgment." ***Morrow v. Torrance Bank (In re Morrow),*** 189 B.R. 793, 808-09 (Bankr. C.D. Cal. 1995) (footnotes omitted). The state and federal claims need not be identical for the doctrine to apply. "In order to determine whether a claim is 'inextricably intertwined' with a state court claim, the federal court must analyze whether the relief requested in the federal action would effectively reverse the state court decision or void its ruling." ***Bechtold v. City of Rosemount***, 104 F.3d 1062, 1065 (8th Cir. 1997). See also ***Hatcher v. United States Trustee (In re Hatcher),*** 218 B.R. 441 (B.A.P. 8th Cir. 1998); ***Johnson***, 210 B.R. at 1006. In other words, "'the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it.'" ***Goetzman v. Agribank, FCB (In re Goetzman),*** 91 F.3d 1173, 1177 (8th Cir.) (quoting ***Keene Corp. v. Cass***, 908 F.2d 293, 296 (8th Cir. 1990)), cert. denied, 519 U.S. 1042, 117 S. Ct. 612, 136 L. Ed. 2d 537 (1996).

[6] There are exceptions to the ***Rooker/Feldman*** doctrine when the state court judgment was "*procured through fraud, deception, accident, or mistake . . . .*" ***Sun Valley Foods Co. v. Detroit Marine Terminals, Inc. (In re Sun Valley Foods Co.),*** 801 F.2d 186, 189 (6th Cir. 1985) (quoting ***Resolute Ins. Co. v. North Carolina***, 397 F.2d 586, 589 (4th Cir. 1968)). Also, "[t]he ***Rooker-Feldman*** doctrine does not apply to bar a suit in federal court brought by a party that was not a party in the preceding action in state court." ***United States v. Owen,*** 54 F.3d at 274. ***See also Snider v. City of Excelsoir Springs, Mo.,*** 154 F.3d 809, 812 (8th Cir. 1998) ("It is true that . . . the ***Rooker-Feldman*** rule does not bar a federal claim brought by one who was not a party to the state court action and therefore not in any position to seek appellate review of the state court judgment.") (citing ***Johnson v. DeGrandy***, 512 U.S. 997, 1005-06, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994)). Other courts have held that ***Rooker-Feldman*** will not apply when the party had no

Because of the infirmity of State Court jurisdiction over Elian Gonzalez, and the pre-emptive power of the Federal Immigration statutes, neither ***Younger Abstention*** nor ***Domestic Relations Abstention***[7] doctrines constitute grounds for inaction by the United States Supreme Court in this case.

"reasonable opportunity to raise his federal claim in state proceedings." ***Wood v. Orange County***, 715 F.2d 1543, 1547 (11th Cir.1983), cert. denied, 467 U.S. 1210, 104 S. Ct. 2398, 81 L. Ed. 2d 355 (1984). *If the state court did not have subject matter jurisdiction over the prior action, its orders would be void ab initio and subject to attack notwithstanding* ***Rooker/Feldman***. ***James v. Draper (In re James)***, 940 F.2d 46, 52 (3d Cir. 1991); ***Lake v. Capps (In re Lake)***, 202 B.R. 754, 758 (B.A.P. 9th Cir. 1996) ("A state court judgment is subject to collateral attack if the state court lacked jurisdiction over the subject matter or the parties, or the judgment was procured through extrinsic fraud."). Finally, an exception to the ***Rooker/Feldman*** doctrine arises when a federal statute authorizes federal review of final state court decisions. See 28 U.S.C. § 2241 (authorizing federal district courts to review state court decisions in habeas corpus proceedings); ***Young v. Murphy***, 90 F.3d 1225, 1230 (7th Cir.1996).

[7] The doctrine of ***In re Burrus***, supra, or ***Matters v. Ryan***, 249 U.S. 375, 39 S.Ct. 315, 63 L.Ed. 654 (1919), does not preclude federal habeas jurisdiction here. When ***Burrus*** was decided, federal courts had no independent habeas jurisdiction. Their power to issue writs was an ancillary aid to their federal jurisdiction (essentially under the precursor of the All Writs Act), and the Court in ***Burrus*** simply determined that a child custody dispute was not regulated by federal law and not within the federal court's limited jurisdiction. ***In re Burrus***, 136 U.S. at 595-597, 10 S.Ct. 850; ***In re Barry; Matters v. Ryan***, supra, 249 U.S. at 377, 39 S.Ct. 315 et seq. In ***Burrus*** the Court expressly reserved the question of its habeas power in child custody cases given federal diversity jurisdiction. 136 U.S. at 597, 34 L.Ed. 503. The statute has since been amended to give the federal courts independent habeas jurisdiction..... While the principles of ***Burrus*** generally dictate federal abstention in domestic relation cases, ***see Magaziner v. Montemuro***, 468 F.2d 782, 787 (1st Cir. 1972); ***Buechold v. Ortiz***, 401 F.2d 371, 373 (9th Cir. 1968), they are not now a bar jurisdictionally to federal habeas. ***See Hart and Wechsler, The Federal Courts and The Federal System*** 1016-1017; ***Wright, Federal Courts*** § 25, at 84-85 (1970). Under the unique circumstances of this case, abstention is clearly not advisable or required."***Nguyen Da Yen v. Kissinger***, 528 F.2d 1194 (9th Cir. 1975).[fn15]

PETITIONER PROPERLY ASSERTS NEXT FRIEND STANDING TO SEEK HABEAS CORPUS

Petitioner Robert A. Hirschfeld, JD, as outlined above in the description of parties, is particularly suited to filing and prosecuting this action, *pro se.* Although a seasoned former practitioner experienced in child-custody-related Habeas Corpus action as well as Federal and Supreme Court matters, Petitioner appears as an individual. [8]It is not necessary that a

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[8]." Most frequently, "next friends" appear in court on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves. E. g., ***United States ex rel. Toth v. Quarles***, 350 U.S. 11, 13, n. 3 (1955) (prisoner's sister brought habeas corpus proceeding while he was being held in Korea). As early as the 17th century, the English Habeas Corpus Act of 1679 authorized complaints to be filed by "any one on . . . behalf" of detained persons, see 31 Car. II, ch. 2, and in 1704 the House of Lords resolved "[t]hat every Englishman, who is imprisoned by any authority whatsoever, has an undoubted right, by his agents, or friends, to apply for, and obtain a Writ of Habeas Corpus, in order to procure his liberty by due course of law." See ***Ashby v. White***, 14 How. St. Tr. 695, 814 (Q. B. 1704). Some early decisions in this country interpreted ambiguous provisions of the federal habeas corpus statute to allow "next friend" standing in connection with petitions for writs of habeas corpus, see, e.g., ***Collins v. Traeger***, 27 F.2d 842, 843 (CA9 1928); ***United States ex rel. Funaro v. Watchorn***, 164 F. 152, 153 (SDNY 1908),[fn3] and Congress eventually codified the doctrine explicitly in 1948. See 28 U.S.C. § 2242 (1982 ed.)..."

"A "next friend" does not himself become a party to the habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest. ***Morgan v. Potter,*** 157 U.S. 195, 198 (1895); ***Nash ex rel. Hashimoto v. MacArthur***, 87 U.S. App. D.C. 268, 269-270, 184 F.2d 606, 607-608 (1950), cert. denied, 342 U.S. 838 (1951). Most important for present purposes, "next friend" standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another. Decisions applying the habeas corpus statute have adhered to at least two firmly rooted prerequisites for "next friend" standing. First, a "next friend" must provide an adequate explanation - such as inaccessibility, mental incompetence, or other disability - why the real party in interest cannot appear on his own behalf to prosecute the action. ***Wilson v. Lane***, 870

Habeas Corpus Petitioner be genetically related to the person detained, nor that he be a member of any bar. [9]

Elian Gonzalez is a six year old minor child, who is incompetent to hire his own counsel or to represent himself in seeking Habeas Corpus relief. Elian is temporarily residing with distant relatives in Miami. The Court may take judicial notice that Elian is likely to be in a continuing environment in which he is unable to forthrightly assert his own desire for reunification with his father. He has been dazzled with Disney World, showered with high-technology toys and gifts, and has apparently been taught his earliest English words "I want to stay in America" for edification of the media. Persons whose desire or offers to represent Elian are based upon political opposition to the present government of Cuba, are not likely to recognize nor assert Elian's strong interest in being reunited with his father.

Obviously, Elian's distant relatives in the U.S. including Respondent Lazaro Gonzalez, are disinclined to take the position taken by Petitioner, seeking lawful return of the child to Juan Miguel Gonzalez in Cuba. Petitioner therefore serves a valuable function in competently placing the issues before the U.S. Supreme Court in a manner enabling this Court to choose its procedural stance.

F.2d 1250, 1253 (CA7 1989), cert. pending, No. 89-81; ***Smith ex rel. Missouri Public Defender Comm'n v. Armontrout***, 812 F.2d 1050, 1053 (CA8), cert. denied, 483 U.S. 1033 (1987); ***Weber v. Garza***, 570 F.2d 511, 513-514 (CA5 1978). Second, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, see, e.g., ***Morris v. United States***, 399 F. Supp. 720, 722 (ED Va. 1975)...., ".

[9] "Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting on his behalf." 28 U.S.C. §2242

Petitioner Hirschfeld asserts that he is up to the difficult task he has initiated; however, in the event this Court chooses to refer to another forum, or to appoint alternate or additional advocates, Petitioner Hirschfeld respectfully urges that he be permitted to continue to actively appear before this Court as an advocate.

STATUTORY AND TREATY GROUNDS FOR RETURN OF ELIAN TO HIS FATHER IN CUBA

Each of the following statutes and treaties point to the ultimate conclusion that there exists no effective nor jurisdictionally sound mechanism for further restraining Elian Gonzalez in the United States rather than expeditiously returning Elian to his Father:

(a)**Parental Kidnaping Prevention Act of 1980** (PKPA) 28 USC 1738A;PL96-611

(b)**International Child Abduction Remedies Act** (ICARA) [10] 42 USC 11601 et.seq.; PL100-300

(c)**Missing Children's Act of 1982** 28 USC 534; PL97-292

(d)**Missing Children's Assistance Act of 1984**, 42 USC 5771 et seq.;PL98-473

(e)**National Child Search Assistance Act**, 42 USC 5779, 5780; PL101-647

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[10] "(1) The international abduction or wrongful retention of children is harmful to their well-being. (2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention. (3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem." (See: Section 1 of Pub. L. 100-300 or the International Child Abduction Remedies Act.)

(f)**International Parental Kidnaping Crime Act of 1995** (IPKCA), 18 USC 1001; PL103-173

(g)International provisions of the **Uniform Child Custody Jurisdiction Act**,[11] as adopted in the statutes of all fifty states. [12]

These are all supportive of the Treaty Obligations of the United States under the **Convention on the Civil Aspects of International Child Abduction**[13] (hereinafter, the Hague Convention) done at the Hague on October 25, 1980 and adopted by the United States on July 1, 1988

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[11] A custody jurisdiction dispute between the United States and Cuba (a country that has not ratified The Hague Convention) must be adjudicated in accordance with the Uniform Child Custody Jurisdiction Act or the Uniform Child Custody Jurisdiction Enforcement Act of the U.S. A Court in the U.S. "shall treat a foreign country as if it were a State of the United States for the purpose of applying the law." Applying the same principles internationally as interstate, "(c), a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this [Act] must be recognized and enforced under [Article] 3." Accordingly, the International Convention, under Article 3 asserts that "the law of the State in which the child was habitually resident immediately before the removal or retention" (i.e., Cuba) is the applicable law.

[12] Florida's version of the UCCJA: F.S.A.§§61.1302 to 61-1348

[13] The Hague Convention establishes legal rights and procedures for the prompt return of children who have been wrongfully removed from one country to another, or retained in one country. Cuba has not signed the Convention but has the right to accede to it. The United States, having signed, is bound thereby. Under The Hague Convention children who have been wrongfully removed or retained abroad are to be returned promptly. The child was removed by his mother without the consent of his father or of Cuba's authorities. The father has repeatedly and publicly requested that the child be returned to him.

Further, there are specific agreements between the United States and Cuba:

(h) The **U.S.-Cuba Joint Communiqué on Cuba-U.S. Migration,** New York City, September 9, 1994 established that both countries agreed to procedures and measures "to ensure that migration between the two countries is safe, legal, and orderly." The agreement established that, "The United States and the Republic of Cuba recognize their common interest in preventing unsafe departures from Cuba which risk loss of human life.

(i) The United States Immigration and Naturalization Service has further adopted uniformly enforced policies to discourage unsafe voyages. Migrants rescued at sea attempting to enter the United States will not be permitted to enter the United States, but instead will be taken to safe haven facilities outside the United States. Further, the United States has discontinued its practice of granting parole to all Cuban migrants who reach U.S. territory in irregular ways."

(j) In 1995 The U.S. and Cuba signed the **Companion Agreement on Migration.** The US government agreed to return to Cuba all those intercepted at sea, if they did not reach the US mainland. This is known in the US as the "wet feet you go back, dry feet you stay" provision The 1994 agreement established that "The Republic of Cuba will take effective measures in every way it possibly can to prevent unsafe departures using mainly persuasive methods."[14]

(k) The 1994 agreement further prohibits "Alien smuggling" between Cuba and the United States. "The United States and the Republic of Cuba reaffirm their

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[14] Public record indicates that the child was found at sea. He never reached the US mainland on his own. Fishermen found him and turned him over to the US Coast Guard.

support for the recently adopted United Nations General Assembly resolution on alien smuggling." They pledged their cooperation to take prompt and effective action to prevent the transport of persons to the U.S. illegally.[15]

(l)**The United Nations Convention on the Rights of the Child** ratified by Cuba and the United States,[16]Article 11

(l) Florida lacks any custody jurisdiction over Elian. Florida's statutes require return of the child to his father.[17]

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[15] The Coast Guard, US media and the State Department describe the incident as an illegal smuggling operation. Two survivors stated that they paid to be transported to the United States. If this is the case, then, the Migration Agreement has been violated as well. The 1994 agreement stated, "The United States and the Republic of Cuba are committed to directing Cuban migration into safe, legal and orderly channels consistent with strict implementation of the 1984 joint communiqué."

[16] "Parties shall take measures to combat the illicit transfer and non-return of children abroad" and "to this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements." Article 35 calls for "all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale or traffic in children for any purpose or in any form."

[17] F.S.A §.61.1348 International application.."The general policies of this act extend to the international area. The provisions of this act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees, and decrees involving legal institutions similar in nature to custody institutions, rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons."

F.S.A §. 61.13(b) 1. "The court shall determine all matters relating to custody of each minor child of the parties in accordance with the best interests of the child and in accordance with the Uniform Child Custody Jurisdiction Act. It is the public policy of this state to assure that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the parties is dissolved and to encourage parents to share the rights and responsibilities, and joys, of

(m) Those who took Elian from his father, and those others who attempt to perpetuate the child's removal, may be subject to Florida criminal statutes.[18]

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child-rearing. After considering all relevant facts, the father of the child shall be given the same consideration as the mother in determining the primary residence of a child irrespective of the age or sex of the child."

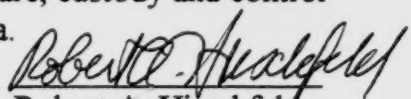
F.S.A.§ 61.1304 (1999) Decisions concerning custody should take place, " ordinarily in the state with which the child and his or her family have the closest connection and where significant evidence concerning his or her care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and the family have a closer connection with another state." (Fla. Stat.)

Florida is not the "home state" of the child nor has the child resided in the state for at least 6 months. F.S.A.§ 61.1308 Jurisdiction. (1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if: (a) This state: 1.Is the home state of the child at the time of commencement of the proceeding, or 2.Had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this state because of his or her removal or retention by a person claiming custody or for other reasons, and a parent or person acting as parent continues to live in this state;) A mere physical presence of the child in the state is not sufficient to confer jurisdiction on a court of the state to make a child custody determination.

[18]F.S.A.§787.03,(1)Whoever, without lawful authority, knowingly or recklessly takes or entices, or aids, abets, hires, or otherwise procures another to take or entice, any child 17 years of age or under or any incompetent person from the custody of the child or incompetent person's parent, his or her guardian, a public agency having the lawful charge of the child or incompetent person, or any other lawful custodian commits the offense of interference with custody and shall be guilty of a felony of the third degree, punishable as provided in §775.082, 775.083, or 775.084; (2) In the absence of a court order determining rights to custody or visitation with any child 17 years of age or under or with any incompetent person, any parent of the child or incompetent person, whether natural or adoptive, stepparent, legal guardian, or relative of such child or incompetent person who has custody thereof and who takes, detains, conceals, or entices away that child or incompetent person within or without the state, with malicious intent to deprive another person of

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges that a Writ of Habeas Corpus issue for the release of Elian Gonzalez from restraint by named Respondents, their agents and successors, and by such other Respondents as may be added to this Petition by Amendment, which restraint hinders or prevents his return to the lawful care, custody and control of his father, Juan Gonzalez, in Cuba.



Robert A. Hirschfeld
PO Box 36563
Phoenix AZ 85067
(602) 274 8276
Petitioner, Pro-Se

Dated January 17, 2000

VERIFICATION

State of Arizona)
County of Maricopa) ss:

Robert A. Hirschfeld, being duly sworn, swears that he has personal knowledge of the facts stated in support of the foregoing Petition for Writ of Habeas Corpus, knows same to be true, or if stated upon Informatuion and Belief, believes same to be true.

Notary_____ ss:_____
Notary Public (Seal) Robert A. Hirschfeld

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his or her right to custody of the child or incompetent person, shall be guilty of a felony of the third degree, punishable as provided in § 775.082, 775.083, or 775.084.)